Supreme Court, U.S.
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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1985

No. 85-1146

PATRICIA KWALLEK,
Petitioner,

vs.

STATE OF ALASKA,
Respondent.

RESPONSE OF THE STATE OF ALASKA TO THE PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ALASKA

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JURISDICTION

Kwallek seeks discretionary review of two issues: (1) an alleged violation of Miranda v. Arizona, 384 U.S. 436 (1966), and (2) an alleged violation of Doyle v. Ohio, 426 U.S. 610 (1976). Kwallek has properly invoked this Court's jurisdiction under 28 U.S.C. §1257 with respect to the Miranda issue. With respect to the Doyle issue, Kwallek satisfies the requirement of having received a final judgment from the highest state court in which a decision could be had, but does not satisfy the requirement of having a decision from the highest state court on the merits of the claim. This will be discussed more fully in the Argument section of the State's response.

QUESTION PRESENTED

Should the trial court have suppressed Kwallek's statements made after she indicated that she wanted to talk her mother when the statements were made during a non-custodial interview?

STATEMENT OF THE CASE

A. The Facts

Patricia Kwallek's husband was shot five times in the chest, neck and head as he was leaving for work on the morning of June 24, 1982. One of the bullets entered his brain and was instantly fatal.

When the state troopers arrived at the scene, Kwallek was watching the emergency medical technicians treat her husband. Kwallek, clad in an off-white robe, told the troopers that she did not know what happened. She explained that her husband had just left for work when she heard some "popping" sounds and her husband scream "Patsy". She ran outside and found her husband lying by the shed. She did not see anyone in the area, nor did she hear any vehicles.

Seven neighbors were interviewed. Six of them heard shots being fired, while one heard nothing unusual until the ambulance siren. Four of the neighbors heard loud voices in addition to the gunshots. Loy Price could not make out what was being said. Lou Ann

Cottle heard the words, "What are you doing, I haven't done anything." and "What's going on here." Mrs. Cottle was certain that the voices she heard belonged to a male, but she could not tell whether the voices were from one or two individuals. Greg Boles heard only one voice, that of a male screaming something to the effect of "Oh, my God", and "I didn't mean it." Mr. Neitzke heard two men shouting at each other, but was unable to discern any words. None of the neighbors saw anyone running away, or any vehicle speeding away.

The area surrounding the Kwallek residence was searched for a sniper. When no one was found, the police began looking for evidence. Three .22 caliber shell casings with "F" logos on them and a live bullet were found by the oil tank near the only door to the Kwallek residence. Two brands of .22 caliber ammunition were found in the second bedroom -- Federal (bearing an "F" logo) and CCI (bearing a "C" logo). In the attic, partially hidden under a box and insulation, was a .22 caliber

automatic rifle belonging to the Kwalleks. Ballistic tests confirmed the police officers' suspicions that this was the murder weapon.

The following afternoon Kwallek agreed to be interviewed by Sgt. Lown and Sgt. Glass of the Alaska State Troopers. The interview took place in Kwallek's kitchen. Eight minutes into the interview Sgt. Lown advised Kwallek of her Miranda rights, and Kwallek executed a written waiver. Kwallek maintained that she did not know who shot her husband. She acknowledged that she was behind on a lot of the bills and that she had not told her husband because she feared he would divorce her.

Near the end of the interview three other troopers entered the Kwallek residence to execute search warrants. These warrants authorized seizure of financial records, a sample of insulation from the attic, and the off-white robe Kwallek was wearing when her husband was shot. Copies of the warrants were given to Kwallek, and Sgt. Lown told her what they were looking for. Sgt Lown then

explained that she had been formally served with copies of the warrants and that the other troopers would conduct the search. He then posed the following question, "Do you have any questions about that?" Kwallek responded, "No. I think I should wait and talk with my mom [when she] gets here before I say what to do."

Sgts. Lown and Glass said nothing further about the search warrants, and switched the topic of conversation back to the events of the previous morning. They also questioned Kwallek about the unpaid bills. Kwallek explained that the bills had not been paid because there was no money to pay them. When asked where the money had gone, Kwallek told the troopers that she wanted to wait till her mother arrived because her mother could help. Kwallek's mother was due to arrive shortly and Kwallek agreed to talk then. Sgt. Glass, after informing Kwallek that the other troopers would begin the search, asked her where the bank records and checkbook were kept, apparently to aid the troopers

in locating the items listed on the warrant. Kwallek stated that her husband did not have a checking account and that she did not keep any books regarding household expenditures. When asked why she did not keep any records, Kwallek reiterated that she wanted to wait until her mother got there. The interview was formally terminated at that time.

Kwallek later agreed to accompany the troopers to the station and wait for her mother there. While Kwallek awaited the arrival of her mother, some of the investigating troopers and the district attorney met to discuss the case. At that time the decision was made to arrest Kwallek. Kwallek made no further statements to the troopers after she was placed under arrest.

Kwallek's robe was sent to a crime lab for analysis. Substantial amounts of lead residue was found on the right sleeve. The pattern of residue was consistent with the pattern which would be created if Kwallek had pulled the trigger of the murder weapon with her left hand. Kwallek is left-handed.

Substantial evidence of the couple's financial problems was introduced at trial, including outstanding bills and letters from creditors. Several of Kwallek's friends testified that Kwallek had borrowed a total of $11,500 from them. There was also evidence that Kwallek's husband, who had been kept in the dark about the financial problems, had discovered the existence of two outstanding bills just prior to the murder. The state theorized that Kwallek and her husband fought about finances on the morning of the murder and that her husband had threatened to divorce her.

Kwallek claimed had no idea who shot her husband or why. She proposed a "mysterious gunman" who stole the murder weapon from the Kwallek residence sometime prior to the shooting, lay in wait for Kwallek's husband to leave for work on the morning of the murder, shot him, sneaked back into the Kwallek residence through its only door, hid the murder weapon in the attic, and then left

the Kwallek residence (all without being seen by Kwallek or anyone else).

Kwallek was indicted for murder in the first degree. A jury found her guilty as charged.

B. Procedural Background

Kwallek appealed her conviction to the Alaska court of appeals. She argued, among other things, that she was in custody from the beginning of the interview and that her statement should have been suppressed under Miranda v. Arizona, 384 U.S. 436 (1966), because she was not advised of her Miranda rights at the beginning of the interview. Alternatively, she contended that the portion of the interview following her first statement that she wanted to talk with her mother should have been suppressed because the continued questioning violated Miranda.

The court of appeals issued a per curiam, unpublished opinion. Kwallek v. State, Alaska App. Memorandum Opinion No. 883 (July 24, 1985). (A copy of the decision is attached to Kwallek's

petition for writ of certiorari as Appendix A. The state will cite the decision as "Slip opinion, p. ___.") The court concluded that Kwallek was not in custody at the start of the interview. It assumed without deciding that the interview had escalated into a custodial interrogation at the time Kwallek was advised of her Miranda rights. (Slip opinion, p. 23 n.14) Proceeding on this assumption, the court of appeals held that Kwallek's initial statement about talking to her mother was made in response to a question about the search warrants and, therefore, did not amount to an unequivocal assertion of the right to remain silent to all further questioning. (Slip opinion, p. 24) Kwallek's second statement about talking to her mother, however, did amount to an assertion of her right to remain silent, so the remaining dialogue should have been suppressed. (Pet. App. A, p. 24-25) Applying the harmless error standard set forth in Chapman v. California, 386 U.S. 18 (1967), the court concluded that Kwallek had not been harmed by the

admission of the statements she made after this point. (Slip opinion, p. 25)

Judge Singleton, in a concurring opinion, disagreed about the treatment of the custody issue. He would affirm the trial court's finding that Kwallek was not in custody during the interview. Since Kwallek was not in custody, Miranda did not apply, so there was no reason to decide whether Kwallek had invoked her right to remain silent. (Slip opinion, p. 29-30) Judge Bryner dissented. He implicitly determined that Kwallek was in custody by the time she said something about wanting to talk to her mother. Judge Bryner would conclude that Kwallek's first statement about talking to her mother constituted an unequivocal assertion of her right to remain silent and that the failure to suppress the remainder of the interview was not harmless error. (Slip opinion, p. 32-34)

For the first time on appeal Kwallek argued that admission of the statements about wanting to talk to her mother amounted to an impermissible

comment on her right to remain silent in violation of Doyle v. Ohio, 426 U.S. 610 (1976). Because the issue had not been raised in the trial court the court of appeals applied the plain error standard of review under Rule 47(b) of the Alaska Rules of Criminal Procedure. It held that even if there were error, the error was not "obviously prejudicial". Given this holding, the court decided it was not necessary to reach the merits of the Doyle issue. (Slip opinion, p. 25-27)

Kwallek petitioned the Alaska supreme court to review the decision of the court of appeals. The Alaska supreme court denied review, and Kwallek has now petitioned this Court for a writ of certiorari to the Alaska court of appeals for review of its decision.

REASONS FOR DENYING THE WRIT

I. MIRANDA WAS NOT VIOLATED BECAUSE KWALLEK WAS NOT IN CUSTODY

In Miranda v. Arizona, 384 U.S. 436 (1966), this Court held that the prosecution may not use statements made during the course of a custodial interrogation unless it demonstrates that the detained person was advised of and voluntarily waived his right to remain silent and his right to counsel. A defendant may exercise his right to remain silent or his right to counsel at any time during a custodial interrogation. His exercise of either or both of these rights must be scrupulously honored. See also Michigan v. Mosley, 423 U.S. 96, 104 (1975).

Cases decided since Miranda make it quite clear that Miranda warnings need only be given to persons who have been taken into custody or have otherwise been deprived of their freedom of action in any significant way. See e.g., California v. Beheler, 463 U.S. 1121

(1983); Oregon v. Mathiason, 429 U.S. 492, 495 (1977) (per curiam); Beckwith v. United States, 425 U.S. 341, 345-46 (1976). The requirement that Miranda warnings be given is limited to custodial interrogations because of the coercive nature of these interrogations. The defendant, who is generally isolated in the police station, may feel he is under a compulsion to speak unless he is fully advised of his rights. This inherently coercive atmosphere is not present in non-custodial settings, so Miranda warnings are not required.

As this Court stated in Michigan v. Tucker, 417 U.S. 433, 444 (1974):

> The Court recognized that these procedural safeguards [Miranda warnings] were not themselves rights protected by the Constitution, but were instead measures to insure that the right against compulsory incrimination was protected.

Since Miranda warnings are not rights in and of themselves, and since Miranda applies only to those who are in

custody when interrogated, it follows that Miranda and Mosley cannot be violated unless the person being questioned is in custody at the time he made the statements.

The defendant in Davis v. Allsbrook, 778 F.2d 168 (4th Cir. 1985), voluntarily appeared at the police station for an interview. He was read the Miranda warnings, and he signed a written waiver agreeing to talk to the police. Sometime into the interview the defendant indicated that he no longer wanted to talk to the police. Nevertheless the police continued asking questions. Eventually he made some inculpatory statements. The court of appeals for the fourth circuit held that Miranda did not apply because the defendant was not in custody. Id. at 170. See also United States v. Mast, 735 F.2d 745, 749 n.4 (2nd Cir. 1984); United States v. Serlin, 707 F.2d 953, 958 (7th Cir. 1983).

Kwallek was not in custody during the June 25th interview. Thus, Miranda does not apply. Kwallek was

interviewed in the kitchen of her home. She was explicitly told at the beginning of the interview that she was not under arrest and that she could leave at any time. The troopers did not place Kwallek under arrest several hours later.

The trial court found that Kwallek was not in custody during the interview. Kwallek appealed that finding to the Alaska court of appeals. The court of appeals dealt with it in two ways. Judge Singleton concluded that the trial court's finding was not clearly erroneous. (Slip opinion, p. 30) The per curiam opinion ruled that Kwallek was not in custody at the beginning of the interview, and assumed without deciding that the interview had escalated into a custodial interrogation by the time the Miranda warnings were read. (Slip opinion, p. 22-23) Kwallek did not appeal the trial court's finding to the Alaska supreme court, and has not sought review of it by this Court. Since the trial court's finding Kwallek was not in custody during the interview has not been overturned, Miranda does not apply.

Kwallek's voluntary statements were properly admitted at trial.

II. ASSUMING MIRANDA DOES APPLY, KWALLEK'S FIRST STATEMENT ABOUT TALKING TO HER MOTHER WAS NOT AN UNEQUIVOCAL ASSERTION OF HER RIGHT TO REMAIN SILENT

Kwallek's police interview was interrupted after about twenty minutes when other troopers entered the Kwallek residence to serve several search warrants. The topic of discussion turned to the warrants. The following exchange then took place:

> Sgt. Lown: We have a search warrant here and you might want to read it. This is your copy of it, for your nightgown, or your bathrobe, or robe ...
>
> Kwallek: (inaudible)
>
> Sgt. Lown: ... and for a sample of insulation out of your attic; we also have a search warrant here for bank and bookkeeping

records of your husband and yourself.

Kwallek: Okay.

Sgt. Lown: You are, you have now been served with copies of each of these search warrants. We're going to have the Troopers outside, who are investigators from Anchorage, come in and conduct the search. Do you have any questions about that?

Kwallek: No. I think I should wait and talk with my mom [when she] gets here before I say what to do.

Sgt. Lown: Okay.

The questioning then returned to the events of the morning of the murder. A few minutes later Kwallek told Sgt. Lown that she did not want to talk anymore until she had the opportunity to confer with her mother.

The trial court and the Alaska court of appeals properly concluded that this initial statement by Kwallek about wanting to talk to her mother was not an

unequivocal assertion of the right to remain silent. The flow of the interview was interrupted when the troopers came in to serve the warrants. Kwallek's statement was in response to an inquiry whether she had questions about the warrants which she had just received. Kwallek said she had no questions, but that she wanted to talk to her mother before saying what to do about the warrants. Under the circumstances, Kwallek's statement was not an unambiguous request to terminate the entire interview. See Taylor v. Riddle, 563 F.2d 1336 (4th Cir. 1977), cert. denied, 434 U.S. 1020 (1978) (suspect's statement that "[y]ou've done asked me a question I can't answer," was an expression of his inability to answer a question; it did not amount to an invocation of his right to remain silent); Vail v. State, 599 P.2d 1371, 1378 (Alaska 1979) (defendant's remark that he did not want to talk about his co-defendant was not an unequivocal assertion of his right to remain silent).

Kwallek asserts that Sgt. Lown interpreted this response as an assertion of her right to remain silent. She cites to the following testimony given by Sgt. Lown at the omnibus hearing:

> Q: [Defense counsel] Now, at some point Mrs. Kwallek, during the interview, indicated that she didn't want to talk any more, is that correct?
>
> A: [Sgt. Lown] Yes.
>
> Q: At what point did she first make that indication?
>
> A: She stated she did not want to talk until after she had talked to her mother.
>
> Q: All right, and was that around the time when the other troopers were coming in to execute the warrants?
>
> A: I believe it was.
>
> Q: Did you and Sergeant Glass then continue to ask her

questions after that point?

A: I believe she was asked a few questions, yes.

Q: Isn't it normal practice that when the subject requests that no more questions be answered, or asked rather, or requests that she doesn't want to talk any more, that the officers are supposed to discontinue questioning?

A: Yes.

Q: But you nevertheless, you and Sergeant Glass, continued to ask questions after that point?

A: We asked her some general questions, yes.

Q: And did she, subsequent to that first -- after she first made an indication she didn't want to talk any more, or she wanted to discontinue the questioning, did she repeat it at a later time?

A: General questions. (O.H. Tr. 75-76)

This is a short excerpt from Sgt. Lown's extensive testimony concerning a number of Kwallek's pretrial motions, including her motion to suppress her June 25th statement. It is not clear whether Sgt. Lown was referring to the first statement about Kwallek's mother or those which appear later in the interview. Kwallek never presented Sgt. Lown with a copy of the transcript of the interview so that he could refer to a specific statement by Kwallek. Given the ambiguous nature of the testimony, and Kwallek's failure to clarify it at the omnibus hearing, she cannot now rely on it as proof that Sgt. Lown interpreted the first statement about talking to her mother as an unequivocal assertion of her right to remain silent.

III. THE ALASKA COURT OF APPEALS PROPERLY APPLIED THE HARMLESS ERROR STANDARD OF CHAPMAN V. CALIFORNIA IN CONCLUDING THAT THE ERROR IN THE ADMISSION OF KWALLEK'S STATEMENTS MADE AFTER THE SECOND STATEMENT ABOUT TALKING TO HER MOTHER WAS HARMLESS BEYOND A REASONABLE DOUBT

Near the end of their interview with Kwallek, Sgt. Lown and Sgt. Glass asked questions about the Kwalleks' financial situation and various unpaid bills. They asked why the bills had not been paid, and Kwallek stated there was no money to pay them. The following exchange then took place:

> Sgt. Lown: What happened to it [the money]?
>
> Kwallek: I will talk when my mom gets here, she can help.
>
> Sgt. Glass: You want to wait until your mom gets here to talk to us?
>
> Kwallek: (Inaudible both are talking) she should be

here here in just a little while. Chris is getting her now.

Sgt. Glass: Do you want to talk to us then, Patsy when she gets here?

Kwallek: Uhuh (yes). Is it be [sic] that okay?

Sgt. Glass: Sure.

Sgt. Lown: Sure, that's fine.

The Alaska court of appeals considered this to be an unambiguous invocation of the right to silent. (Slip opinion, p. 24) It ruled that the statements which Kwallek made after this point should have been suppressed. The remainder of the interview reads:

Sgt. Glass: In the mean[time] we'll just sit here and wait, and let the other two investigators go ahead and ah, maybe you can tell us where the ah, bank records ah, are. Do you have a checking account Patsy?

Kwallek: Umuh (no).

Sgt. Glass: No checking account? How do you keep track of your ah, bills?

Kwallek: Spader [Kwallek's husband] keeps money in there. He has money in ah, a, billfold in there and there should be several hundred dollars in it.

Sgt. Glass: You don't have a checking account?

Kwallek: No.

Sgt. Glass: Has he ever had a checking account?

Kwallek: No.

Sgt. Glass: Ah, your, your background Patsy and your training has been in book-keeping is that correct?

Kwallek: Umuh (yes).

Sgt. Glass: Do you keep any kind of books at all? On the money spent out?

Kwallek: Umuh (no). No.

Sgt. Glass: [How] come that is?

Kwallek: I don't know I just, [when] mom gets here we'll talk about it.

Sgt. Glass: Okay. At the time is approximately 2:14 p.m. We'll go off record.

The Alaska court of appeals held that any error in admitting these few statements was harmless beyond a reasonable doubt, and thus harmless error under Chapman v. California, 386 U.S. 18 (1967). (Slip opinion, p. 24-25) Kwallek contends that the Alaska court of appeals came to the wrong conclusion -- that the admission of these few statements did prejudice her. Essentially, Kwallek is seeking review of a factual determination made by the state court. This Court should not exert its jurisdiction to review this factual finding. The issue is not one of constitutional dimensions. A decision by this Court will not change the law or provide guidance to other courts. It is simply not an issue which warrants review by

this Court. See Lloyd A. Fry Roofing Co. v. Wood, 344 U.S. 157, 160 (1952), rehrg. denied, 345 U.S. 913 (1953).

The evidence of guilt was quite strong. The murder weapon belonged to the Kwalleks. It was found in the attic of the Kwallek residence. The murderer would have had to place it there within minutes of the shooting because the police and medical personnel arrived within minutes. Ammunition for the murder weapon was found in the second bedroom. The pattern of gunshot residue found on the sleeve of Kwallek's robe was consistent with Kwallek's having fired the murder weapon.

Moreover, it is not clear from the record that the jury was even aware of the substance of Kwallek's statements made after she said she wanted to talk to her mother. The above-quoted excerpt from the June 25th interview was located on pages 42 and 43 of a 43-page typed transcript of the interview. The transcript was not read aloud for the jury. It was one of 94 exhibits introduced at trial. No tape of the interview was

played for the jury. Sgt. Lown, who testified about the substance of the interviews, made no reference to these statements. The prosecutor did not refer to the statements at any time during the trial. Even assuming the jury were aware of the statements because it read the transcript, there was nothing inculpatory about the statements. All Kwallek said was her husband did not pay his bills by check, he kept his money in his wallet, and she had some bookkeeping experience. This information was available from other sources (e.g., banks, Kwallek's previous employers, and financial records seized pursuant to the warrant).

The Alaska court of appeals correctly concluded that the error was harmless beyond a reasonable doubt.

IV. THIS COURT DOES NOT HAVE JURISDICTION TO CONSIDER THE DOYLE ISSUE

On appeal to the Alaska court of appeals Kwallek argued that admission of the transcript of her June 25th interview containing statements that she

wanted to talk to her mother before answering anymore questions constituted an impermissible comment on her right to remain silent under Doyle v. Ohio, 426 U.S. 610 (1976). Kwallek now requests that this Court decide the issue.

The State of Alaska submits that this Court does not have jurisdiction to consider the issue under 28 U.S.C. §1257(3). The Alaska court of appeals determined that this issue was raised for the first time on appeal. This conclusion was correct. Kwallek's motion and supporting memorandum in the trial court concentrated on whether Kwallek was in custody. Doyle was not cited in either the motion or the memorandum, and there was no hint of an argument that the latter part of the interview should be suppressed because it amounted to an impermissible comment on the right to remain silent. (Kwallek's motion to suppress and supporting memorandum are included as an appendix to the State's response.) The Alaska court of appeals properly determined that the

Doyle issue was raised for the first time on appeal.

The court of appeals did not reach the merits of the Doyle issue; rather, it concluded it did not have to rule on this issue because even if there were error, the error was not obviously prejudicial and did not require reversal. The court of appeals stated:

> Here, assuming admission of the challenged evidence constituted an error affecting Kwallek's substantial rights, we conclude that the error was not obviously prejudicial.

(Slip opinion, p. 26-27) (Emphasis supplied; citations omitted).

Since the Doyle issue was not properly preserved and since the Alaska court of appeals did not decide the merits of the issue, Kwallek cannot invoke this Court's jurisdiction under 28 U.S.C. §1257(3). This Court must refuse to consider the issue. Wilson v. Cook, 327 U.S. 474, 482 (1946).

CONCLUSION

Kwallek's petition for writ of certiorari should be denied.

Respectfully submitted this 17th day of March, 1986.

HAROLD M. BROWN
ATTORNEY GENERAL

By: David Mannheimer
David Mannheimer
Assistant Attorney General

APPENDIX

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN

STATE OF ALASKA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
PATRICIA KWALLEK,	)	
	)	
Defendant.	)	
	)	No. 1KE-S82-637 Cr.

MOTION TO SUPPRESS JUNE 25TH
STATEMENT OF DEFENDANT

COMES NOW the defendant, PATRICIA KWALLEK, by and through her attorneys, BIRCH, HORTON, BITTNER, MONROE, PESTINGER & ANDERSON, and hereby moves this court for an ORDER, suppressing the statement given by the defendant to Alaska State Troopers John Glass and Robin Lown on June 25, 1982.

This motion is made for the reason that prior to the June 25th statement, the defendant was not first apprised of her constitutional rights.

In the alternative, the defendant requests that the court suppress that portion of the statement which was given prior to the rendition of the Miranda warnings.

As a final alternative, the defendant requests that the court suppress that portion of the statement given after the defendant indicated she wanted to break off the interview.

This motion is based upon the attached MEMORANDUM IN SUPPORT as well as the accompanying exhibits.

DATED this 23rd day of September, 1982.

BIRCH, HORTON, BITTNER,
MONROE, PESTINGER
& ANDERSON

By_____
Daniel Westerburg

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA

FIRST JUDICIAL DISTRICT AT KETCHIKAN

STATE OF ALASKA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
PATRICIA KWALLEK,	)	
	)	
Defendant.	)	
	)	No. 1KE-S82-637 Cr.

MEMORANDUM IN SUPPORT OF
DEFENDANT'S MOTION TO SUPPRESS
JUNE 25TH STATEMENT OF DEFENDANT

Factual Background

On June 24, 1982, Bernard "Spade" Kwallek was shot and killed in the front yard of his residence on North Tongass Boulevard in Ketchikan. His wife, Patsy Kwallek, was informally interviewed several times at the scene and a formal, tape recorded, interview was conducted later that day. Mrs. Kwallek's knowledge of the shooting was limited and she denied any involvement. By late that evening, however, Mrs. Kwallek had become the State's prime suspect in the case. (See comments of Sgt.

John Glass to witness James Jenck in Mr. Jenck's June 24th statement. Exhibit "A".)

On the afternoon of June 25, 1982, Sgt. Morris Rogers of the Alaska State Troopers picked up Mrs. Kwallek from the Jenck residence where she had been staying and drove her back to the Kwallek residence for an interview with Sgt. Glass and Sgt. Robin Lown of AST.

A transcript of the interview was prepared and a copy was provided to the defendant who, for the purposes of this motion, is willing to assume its general accuracy. (Exhibit "B") It appears that the interview was conducted in the Kwallek residence with Mrs. Kwallek, Sgt. Lown and Sgt. Glass the only persons present.

Mrs. Kwallek was not advised of her constitutional rights before the questioning began.

The interview commenced with Sgt. Glass informing Mrs. Kwallek that she was not under arrest. Sgt. Glass then advised Mrs. Kwallek that he believed that in her previous statements she had not been telling the "true story" of what had happened on the morning of the shooting. (Exhibit "B," page 1) Mrs. Kwallek responded: "I'll try to help any way I can" and then proceed

[sic] to explain what transpired on the morning of June 24th. Her response to Sgt. Glass' and Sgt. Lown's questions were [sic] consistent with those in her June 24th statement (Exhibit "C") as well as her informal statements taken at the scene shortly after the shooting.

Approximately 8 minutes after the interview began, Sgt. Lown temporarily discontinued questioning in order to advise Mrs. Kwallek of her constitutional rights. Mrs. Kwallek indicated that she understood her rights and agreed to continue to talk with the Troopers. (Exhibit "B," page 6). The interview then re-commenced.

After several more minutes of questioning, Sgt. Glass served Mrs. Kwallek with search warrants for her bathrobe, a sample of attic insulation and bank and bookkeeping records at the residence. Sgt. Glass then apparently brought in several investigators from Anchorage to conduct the search.

At this time, Mrs. Kwallek stated: "I think I should wait and talk with my Mom gets here [sic] before I say what to do." (Exhibit "B," page 14)

Ignoring Mrs. Kwallek's remark, Sgt. Lown and Sgt. Glass then continued to

question Mrs. Kwallek in a much more aggressive fashion. (Exhibit "B," pages 14-17) Mrs. Kwallek then repeated: "I will talk when my Mom gets here, she can help." (Exhibit "B," page 17)

Again ignoring Mrs. Kwallek's remark, Sgt. Glass continued to question Mrs. Kwallek until she stated for the third time: "I don't know, I just, Mom gets here we'll talk about it." (Exhibit "B," page 18)

Shortly thereafter, Mrs. Kwallek was taken to the Ketchikan Detachment of AST where she was formally arrested by Sgt. Glass on suspicion of the First Degree Murder of Bernard Kwallek.

ARGUMENT

I

THE INTERVIEW OF MRS. KWALLEK WAS CONDUCTED IN A CUSTODIAL SETTING; ACCORDINGLY, MRS. KWALLEK WAS ENTITLED TO RECEIVE MIRANDA WARNINGS PRIOR TO QUESTIONING

Under the U.S. Supreme Court's holding in Miranda v. Arizona, 384 U.S. 436 (1966), a person who has been "taken into custody or

otherwise deprived of his freedom of action in any significant way" is entitled to be advised of his constitutional rights prior to questioning. The failure of police officers to properly advise a suspect of his rights, results in the suppression of any statements or other evidence gained thereby. Furthermore, police cannot "fix" a non-existent or inadequate Miranda warning by an "after the fact" warning. Westover v. United States, 384 U.S. 436 (1966).

In Hunter v. State, 590 P.2d 888 (Alaska 1979), the Alaska Supreme Court adopted the "objective, reasonable person" test to determine the existence of a custodial setting triggering the Miranda requirement. Under the test, there must be some actual indication of custody, such that a reasonable person would feel he was not free to leave and break off police questioning. The court established three (3) general factors to be considered in determining the existence of a custodial setting:

1. Facts intrinsic to the interrogation: when and where the interrogation occurred, how long it lasted, how many police were present, what the officers and the defendant said and did, the presence of actual physical restraint on the defendant

or things equivalent to actual physical restraint such as drawn weapons or a guard stationed at the door, and whether the defendant was being questioned as a suspect or a witness.

2. Facts pertaining to events before the interrogation are also relevant, especially how the defendant got to the place of questioning -- whether he came completely on his own, in response to a police request, or escorted by police officers.

3. It is also important what happened after the interrogation -- whether the defendant left freely or was detained or arrested.

By applying the above 3 factors to the present case, it is clear that Mrs. Kwallek was in a custodial setting during the June 25th interview.

1. Setting.

While the interview admittedly took place in Mrs. Kwallek's residence, it must be remembered that it was conducted by 2 police officers and that none of Mrs. Kwallek's family or friends were present. It must also be remembered that sometime during the midst of the interview, apparently several other investigators

were in the residence conducting a search pursuant to several search warrants.

There can be little doubt from the tenor of the questioning, that Mrs. Kwallek was being questioned not as a witness but as the State's prime suspect in the case. This fact is confirmed by Sgt. Glass' statement to James Jenck on the evening before the interview that Mrs. Kwallek was supected of shooting her husband. [Exhibit "A"]

2. Pre-Interview Facts.

Mrs. Kwallek was escorted to the residence by Sgt. Morris Rogers who was presumably in uniform and using a marked Troopers vehicle. Mrs. Kwallek obviously came to the interview in response to a police request.

3. Post-Interview Facts.

Mrs. Kwallek was taken to Trooper Headquarters at the conclusion of the interview where she was formally arrested by Sgt. Glass. It is important to note that Mrs. Kwallek did not disclose any "new" material or information at the second interview. Thus, the Troopers arrested Mrs. Kwallek based upon the circumstantial evidence they had already obtained before the interview took place. Accordingly, it is highly likely that the only reason Mrs. Kwallek was not

arrested prior to the interview was so that the Troopers could attempt one last "non-Miranda" interview prior to her formal arrest.

A similar situation occurred in State v. Cassell, 602 P.2d 410 (Alaska 1979) where a police office delayed serving a suspect with an arrest warrant until after questioning. The officer stated that the reason for this was to obtain a statement from the suspect. The court took this factor into consideration in determining that Cassell was in de facto custody and was entitled to Miranda warnings prior to questioning. (See also In the Matter of J.M.A., 542 P.2d 170 (Alaska 1975).)

Under the criteria established in Hunter v. State, it is fairly clear that Mrs. Kwallek was in a custodial setting at the time of the June 25th interview. The failure of the State to advise Mrs. Kwallek of her constitutional rights at the outset of the interview should result in a suppression of the statement, together with any fruits thereof.

II

THE LATE MIRANDA WARNING GIVEN BY SGT. LOWN CANNOT "FIX" A TAINTED INTERVIEW

As mentioned in the Statement of Facts, approximately during the middle of the interview, Mrs. Kwallek was formally advised of her Miranda rights. However, an untimely Miranda warning cannot "fix" the tainted interview. Under the "cat-out-of-the-bag" principle first enunciated in Westover v. United States, 384 U.S. 436 (1966), if a suspect has not been given a proper Miranda warning at the outset of a custodial interrogation, the fact that a proper warning is given at some later time cannot rectify the situation. The entire interview is "tainted" by the Miranda violation and none of the statement is admissible. For this reason, the entire interview of Mrs. Kwallek must be suppressed, despite the fact that a Miranda warning was given during the midst of the interrogation.

CONCLUSION

Mrs. Kwallek was clearly in a custodial setting at the time of the June 25, 1982 interview. There is absolutely no excuse for the

failure of Sgt. Lown and Sgt. Glass, both experienced Troopers, to advise Mrs. Kwallek of her constitutional rights prior to the interview. There can be no doubt that a formal arrest was intended and that if Mrs. Kwallek had attempted to leave the area she would have been placed under physical restraint.

For all these reasons, the defendant respectfully requests that her MOTION TO SUPPRESS be granted.

DATED this 23rd day of September, 1982.

RIRCH, HORTON, BITTNER,
MONROE, PESTINGER
& ANDERSON

By_____
Daniel Westerburg